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KRISTIN K. MAYES

In the matter of:

WORLDWIDE FOREX, INC.
Steven Labell, Registered Agent
700 North Hiatus Road, Suite 203
Pembroke Pines, Florida 33026

UNIVERSAL FX, INCORPORATED
Darren C. Blum, P.A., Registered Agent
8751 West Broward Boulevard
Plantation, Florida 33324

DAVID BRIDGES
c/o WORLDWIDE FOREX
700 North Hiatus Road, Suite 203
Pembroke Pines, Florida 33026

Respondents.

DOCKET NO. S-03541A-03-0000

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO VACATE SECOND PROCEDURAL ORDER AND IN THE ALTERNATIVE, MOTION TO SET ASIDE DEFAULT

(Pre-Hearing Conference Requested)

Respondents Worldwide Forex, Inc., ("Worldwide") Universal FX, ("UFX") Incorporated, and David Bridges ("Bridges")(collectively "Respondents"), pursuant to Rule 55(c) Ariz. R. Civ. P. hereby submit their Reply in Support of Motion to Vacate Second Procedural Order and in the Alternative, Motion to Set Aside Default (the "Reply"). The arguments raised by the Division are unavailing, and the Default should be set aside because, (i) cases should be tried on their merits, (ii) Respondents never received a copy of the Divisions Motion for Entry of Default, and (iii) the failure to defend was the result of excusable neglect. This Reply is supported by the following Memorandum of Points and Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Background

The material facts are not in dispute. They are set forth fully in Respondents' Motion. In opposition to the Respondents' Motion to set aside the default, the Division advances two arguments, neither of which have merit. The Division argues, (i) that the fact that the Motion for Entry of Default was not received by Respondents counsel is irrelevant, and (ii) that Respondents have failed to show excusable neglect.

Contrary to the Division's unsupported assertions, the fact that Respondents' counsel never received the Motion for Entry of Default is highly relevant. In addition, the Respondents have shown the requisite excusable neglect necessary to set aside the default. Had Respondents' counsel received the Motion for Entry of Default, the alleged defects could have been easily cured.

II. Respondents' Counsel Never Received the Motion for Entry of Default.

The Division attempts to cast the entry of the Second Procedural Order as a "ministerial act" performed by the Administrative Law Judge at the request of the Division. See Response at p. 4. The Division concludes that since Respondents failed to file a Motion for Admission Pro Hac Vice, that they were in default on January 24, 2004, and that nothing could be done to cure the default at that point:

> As a result, Respondents' arguments regarding whether or not they received the Division's Default Motion are entirely irrelevant to the issue of whether default was proper in this matter, and whether the Commission should set aside the SPO. The parties were already in default.

See id.

The Division's argument completely ignores the statutory framework surrounding the entry of default judgments in Arizona. Of note is the fact that the Division does not dispute that the procedures outlined in Rule 55 of the Ariz. R. Civ. P. govern the entry of default judgments in

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proceedings before the Commission. The Division has cited no authority and Respondents were unable to find any, allowing the Commission to enter a default without adhering to the procedures outlined in the Rules of Civil Procedure.

Typically, an application or motion for entry of default is filed if the respondent in an action fails to answer or otherwise defend. See Rule 55(a), Ariz. R. Civ. P. However, the default does not become effective until ten (10) days after the filing of the application for entry of default: "*Effective Date of Default.* A default entered by the clerk shall be effective ten (10) days after the filing of the application for entry of default." See id.

The Respondent, therefore, has ten (10) days within which to cure the default before it becomes effective. "*Effect of Responsive Pleading.* A default shall not become effective if the party claimed to be in default pleads or otherwise defends as provided by these Rules prior to the expiration of ten (10) days from the filing of the application for entry of default." Id. In this case, the Respondents have provided, by affidavit, evidence that they never received the Motion for Entry of Default. Therefore, they were unable to cure the default, which could have been accomplished within the ten day time limit. In fact, our Answer had already been submitted on November 26, 2003. There can be no question that the default would have been cured had the Motion been received.

The fact that the Motion for Entry of Default was not received is directly relevant to this matter. Had the Motion for Entry of Default been received, the default could have been cured and it would never have been effective.

III. The Default Should be set Aside pursuant to Rule 60(c).

Here, good cause exists pursuant to Rule 55(c) and 60(c) to set aside the entry of default. Without receiving the Motion for Entry of Default, Respondents did not have the ability to cure the

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defects. Had Respondents' counsel been aware that a Motion for Entry of Default had been filed, it would have been able to cure the perceived defects.

As noted in Respondents' Motion, it would be unreasonable to conclude that Respondents would be able to respond to a Motion about which they were unaware. See Cook v. Industrial Com'n of Arizona, 133 Ariz. 310, 312 , 651 P.2d 365, 367 (1982) (finding excusable neglect existed where secretary failed to inform attorney of deadline.)

The Division correctly points out that the test is, "whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under similar circumstances." Daou v. Harris, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984). It is difficult to imagine a reasonably prudent person able to respond to an application for entry of default about which they are unaware.

IV. Fundamental fairness and public policy dictate that this action should be tried on the merits.

This case should be tried on the merits. The Division makes no response to this most basic premise of law. "[C]ases should be tried on their merits if it is at all possible." Wohlstrom v. Buchanan, 180 Ariz. 389, 394, 884 P.2d 687, 692 (1994).

Respondents should not be punished for failing to respond to a motion about which they were unaware. See Duron v. State ex rel. Dept. of Economic Sec., 145 Ariz. 99, 100, 699 P.2d 1330, 1331 (App. 1985) ("In practically all other fields of law we have rules and abundant case law which affords relief in appropriate cases where a party fails to meet a specific time limitation.... It is the announced general policy of the law that cases should be tried on their merits and not disposed of on technicalities.")

Respondents have since filed the Motion for Admission Pro Hac Vice of Mr. Dunn. No prejudice will result to the Division by allowing this case to be heard on its merits. The Motion should be granted.

V. Conclusion

The elements to set aside the entry of default have been met. But for the failure of Respondents' counsel to receive a copy of the Motion for Entry of Default, there would be no default. This case should be heard on the merits. Respondents respectfully request that the Second Procedural Order be Vacated and/or that the entry of Default be set aside.

RESPECTFULLY SUBMITTED this 14th day of April, 2004.

ROSHKA HEYMAN & DeWULF, PLC

By _____

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ORIGINAL and thirteen copies of the foregoing hand-delivered this 14th day of April, 2004 to:

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COPY of the foregoing hand-delivered this 14th day of April, 2004 to:

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UniversalFX.ACC/pld/reply to Div's RT MO to Vacate 2nd Proc OR.doc

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